Supreme Court, U. S.
FILED
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-1615

CHRISTOPHER ANDREW JOHNSTON, a minor, by Robert R. Bryson and Barbara Faye Bryson, his general guardians, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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Subject Index

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Constitutional provisions and statutes involved	3
Statement	3
Reasons for granting the writ	6
Conclusion	11

Table of Authorities Cited

Cases	Pages
Brooks v. United States, 337 U.S. 49 (1949)	9
Coffey v. United States, 455 F.2d 1380 (9th Cir. 1972), aff'g 324 F.Supp. 1087 (S.D. Ca. 1971)	5
Feres v. United States, 340 U.S. 135, 71 S.Ct. 153 (1950)	2, 3, 5, 6, 7, 8, 9, 10
Hale v. United States, 416 F.2d 355 (6th Cir. 1969)	9
Henninger v. United States, 473 F.2d 814 (9th Cir. 1973), cert. denied 414 U.S. 819 (1973)	5
Pacific American Fisheries v. Mullany, 191 F.2d 137 (9th Cir. 1951)	8
United States v. Brown, 348 U.S. 110, 75 S.Ct. 141	7, 9
United States v. Muniz, 374 U.S. 150, 83 S.Ct. 1850 (1963)	6, 7, 8, 9, 10
Weber v. Aetna Casualty & Surety Company, 406 U.S. 164, 92 S.Ct. 1400 (1972)	8, 9
Weinberger v. Wiesenfeld, 420 U.S. 636, 95 S.Ct. 1225 (1975)	7

Constitutions

United States Constitution:	Pages
Fifth Amendment	3, 7
Fourteenth Amendment	7
Section 1	3

Statutes

28 U.S.C. (Federal Tort Claims Act):	
Section 1254(1)	2
Sections 2671 et seq.	2, 3, 10
Section 2674	3
Sections 2674 et seq.	6
Section 2680	3

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No.

CHRISTOPHER ANDREW JOHNSTON, a minor, by Robert R. Bryson and Barbara Faye Bryson, his general guardians, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

Petitioner requests that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Ninth Circuit entered in this case on February 24, 1977, affirming the judgment of the United States District Court for the Eastern District of California entered on August 4, 1975.

OPINIONS BELOW

The opinion of the District Court for the Eastern District of California granting the Respondent's Motion for Summary Judgment is printed in Appendix B hereto. That opinion has not been reported. The opinion of the Court of Appeals, which affirmed the judgment of the District Court for the Eastern District of California, is printed in Appendix A hereto. That opinion is not for publication and has not been reported.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was made and entered on February 24, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Is a minor child barred from suing the United States of America under the Federal Tort Claims Act for the wrongful death of his father, who was on active duty in the Air Force and was on a military base, but, was off military duty for the weekend and was engaged in solely personal matters at the time of the accident, and the conduct supporting the theory of recovery against the United States of America was conduct by non-military personnel?

2. Is there a lack of a realistic relationship between the classification created by the *"Feres Doctrine,"* to the extent the doctrine is deemed to exclude an action by this Petitioner against the United States of America under the Federal Tort Claims Act, and any governmental objective, so as to cause the denial of that right to sue the United States of America to be a denial of the Petitioner's right to equal protection of law as guaranteed by the Fifth Amendment of the United States Constitution?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment, United States Constitution (set forth in Appendix C).

2. The Fourteenth Amendment, Section 1, United States Constitution (set forth in Appendix C).

3. The Federal Tort Claims Act (28 U.S.C. Sections 2674 and 2680) (set forth in Appendix D).

STATEMENT

This lawsuit was filed on August 12, 1973 by Mr. and Mrs. Robert R. Bryson as guardians for Christopher Andrew Johnston, a minor born March 16, 1971. For purposes of this Petition, Christopher Andrew Johnston will be referred to as the Petitioner. The action was filed against the United States of America as one arising under the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq. The complaint prays for general and special damages for the death of the Petitioner's father.

The complaint alleges that on December 10, 1971 the Petitioner's father, a Captain in the United States Air Force, was driving a motor vehicle within the confines of Beale Air Force Base when his vehicle was struck by a vehicle driven by Edward P. Sewar. Sewar's vehicle was being driven on the wrong side of the road at the time of the collision. Captain Johnston died as a result of the injuries received. The complaint further alleges that immediately prior to the collision, the United States of America, acting through its agents and employees, sold or furnished alcoholic beverages to Sewar in such quantity as to cause him to become intoxicated, and continued furnishing Sewar with alcoholic beverages although they knew, or ought to have known, that Sewar was intoxicated. These alcoholic beverages were furnished to Sewar on Beale Air Force Base at the flightline cafeteria.

The respondent answered the complaint and admits that the immediate cause of the accident and the subsequent death of Petitioner's father was the fact that Edward P. Sewar was driving on the wrong side of the road. The respondent also admits that immediately prior to the accident Edward P. Sewar consumed intoxicating amounts of beer at the base exchange cafeteria and that Sewar's intoxicated condition caused him to drive the vehicle in such a manner as to collide with the Petitioner's father and ultimately to cause his father's death. (R 9-12)

As an affirmative defense the respondent claims the complaint failed to state a claim upon which relief

can be granted for the reason that Petitioner's father was on active duty with the United States Air Force and not on furlough at the time the accident occurred. The respondent then filed a Motion for Summary Judgment based upon that defense.

The Summary Judgment was granted for the respondent under the Rule of *Feres v. United States,* 340 U.S. 135 (1950) as read by the Ninth Circuit Court of Appeals and applied in *Henninger v. United States,* 473 F.2d 814 (9th Cir. 1973), cert. denied 414 U.S. 819 (1973). The Ninth Circuit Court of Appeals had previously held in the *Henninger* Case that *Feres* absolutely bars Federal Tort Claims Actions by servicemen injured "while on active duty and not on furlough . . . due to the negligence of others in the armed forces." *Henninger,* 473 F.2d at 815-816. In footnotes 2 and 3 to that opinion, the Court indicated that its reading of *Feres* was a strict and absolutist one.

On Appeal, the Court of Appeals affirmed. That Court again followed the *Henninger* Case and, in addition, relied upon *Coffey v. United States,* 455 F.2d 1380 (9th Cir. 1972), aff'g 324 F.Supp. 1087 (S.D. Ca. 1971), since the accident occurred while Petitioner's father was on post. With regard to the contention that the application of the *Feres Doctrine* to this case has equal protection implications, that court found the suggestion to be unfounded.

REASONS FOR GRANTING THE WRIT

The principal reason for granting this Petition for Certiorari is that the decision of the Court of Appeals is in conflict with applicable decisions of this Court on two important questions of Federal Law. In addition, the decision by the Ninth Circuit Court of Appeals is in conflict with a decision by the Sixth Circuit Court of Appeals.

In 1950, this Court ruled in *Feres v. United States,* 340 U.S. 135, 71 S.Ct. 153 (1950), that a member of the Armed Forces could not recover under the Federal Tort Claims Act (28 U.S.C. §2674 et seq.) on a tort that occurred while that serviceman was engaged in an activity "incident to service". That decision and the ruling therein came to be known as the *"Feres Doctrine"*. The Ninth Circuit Court of Appeals has adopted a strict and absolutist reading of the *Feres* Case and determined that the Petitioner cannot sue the United States of America because his father was on active duty and not on furlough, and because his father was on a military post at the time of the injury that resulted in his death.

It is submitted that such a strict and absolutist reading of the *Feres* Case is unnecessary and inconsistent with this Court's decision in *United States v. Muniz,* 374 U.S. 150, 83 S.Ct. 1850 (1963). In the *Muniz* Case this Court stated:

> "In the last analysis, *Feres* seems best explained by the 'peculiar' and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty."

This quotation was taken by this Court in *Muniz* from an early decision by this same Court in *United States v. Brown,* 348 U.S. 110, 112, 75 S.Ct. 141, 143.

The case now before this Court is one wherein the negligence is not even alleged to have been by anyone in the military, much less superiors of Petitioner's father. The negligence is alleged to have been by employees of the cafeteria. That cafeteria, although on post, is not a part of the Armed Services and is not staffed by military personnel, at least not while they are on duty. To allow this lawsuit would in no way detract from military discipline but, on the contrary, may well enhance discipline to the extent the military can have an influence on the indiscriminate distribution of alcoholic beverages at the cafeteria on Post.

To deny a lawsuit by this Petitioner and others similarly situated, is to deny such persons the due process of law that is guaranteed to them by the Fifth Amendment of the United States Constitution. The Fifth Amendment's due process clause incorporates the Fourteenth Amendment's equal protection clause. *Weinberger v. Wiesenfeld,* 420 U.S. 636, 95 S.Ct. 1225 (1975). Under the principles of the equal protection clause, the *"Feres Doctrine",* to the extent it applies to this Petitioner, is unconstitutional. There is a total lack of a realistic relationship between the

denial of the right to sue, and any governmental objective. The stated objective for the *"Feres Doctrine"* is that which is quoted above from the *Muniz* Case. There is a total lack of relationship between those who operate the cafeteria on Post and the Petitioner's father. A lawsuit against the United States of America based upon a theory of improper conduct by the employees of the cafeteria will not have any adverse effect on military discipline.

The government moves for Summary Judgment upon the bare facts that the Petitioner's father was on active duty in the Air Force and was on Post at the time of the accident that caused his death. In order to avoid a Summary denial of this Petitioner's right to due process of law, the government should, at a minimum, be required to present testimony by declaration or otherwise that the lawsuit will have a detrimental effect upon military discipline. Only in that way can there be established a relationship between the denial of the right to sue and a legitimate governmental objective. This Court has previously held that important constitutional issues should not be determined by Summary Judgment. *Pacific American Fisheries v. Mullany,* 191 F.2d 137 (9th Cir. 1951).

This case is strikingly similar to the case presented in *Weber v. Aetna Casualty & Surety Company,* 406 U.S. 164, 92 S.Ct. 1400 (1972). There this Court considered the question of the right of dependent, unacknowledged, illegitimate children to recover under the Louisiana workman's compensation laws, benefits

for the death of their natural father, on an equal footing with that father's dependent legitimate children. In both that case and the present one the Plaintiff is a child who seeks to recover money under a statutory scheme. This Court asks the question "what legitimate state interest does the classification promote?" *Weber,* 406 U.S. at 173. The same question can now be asked with regard to the Petitioner herein and the application of the *Feres Doctrine* to him. The answer is the same in both cases, there is no legitimate governmental interest promoted by the classification.

In addition to the decision by the Ninth Circuit Court of Appeals being in conflict with decisions of the court, the decision is in conflict with a decision by at least one other Circuit Court of Appeals. In *Hale v. United States,* 416 F.2d 355 (6th Cir. 1969) the Court of Appeals reversed a decision by the District Court granting the government motion to dismiss a lawsuit brought by the father of a minor serviceman. In that case the serviceman was injured while on active duty and not on furlough or leave. The District Court granted the government's dismissal on the simple grounds that Hale's injuries arose out of or were in the course of activity incident to military service and, hence, the suits were barred under *Feres v. United States,* 340 U.S. 135, 146 (1950). The Circuit Court of Appeals analyzed that decision in light of the *Feres* Case, *Brooks v. United States,* 337 U.S. 49 (1949), *United States v. Brown,* 348 U.S. 110 (1954) and *United States v. Muniz,*

374 U.S. 150 (1963). That Circuit's reading of those cases caused it to conclude that the decision had to be reversed and the case sent back to the District Court for purposes of determining whether or not Hale's injuries arose out of "the line of duty".

It is clear that the Ninth Circuit Court of Appeals in the matter now presented to this Court is in direct conflict with the Sixth Circuit Court of Appeals on this particular issue. The Ninth Circuit has determined that it is not significant to ascertain the exact nature of the injured party's relationship to the military in order to deny the lawsuit under the Federal Tort Claims Act. The Sixth Circuit would have the trial Court investigate those facts.

With this conflict between the Circuits the time is particularly appropriate for this Honorable Court to specifically answer the question posed in this Petition. Certainly the Petitioner in this suit is vitally concerned with this Court's willingness to undertake to answer these questions at this point in time. On a larger scale, the military service has undergone such major changes since 1950 that it is in the interest of National Defense and the efficient administration of the military services to resolve the dispute. It is unacceptable to have a different application of the Federal Court Tort Claims Act and the *"Feres Doctrine"* by the different Circuits. It is up to this Court to resolve the differences that exist so that the question of whether or not an injured serviceman will be compensated will not turn on whether the serviceman is stationed in California or in Tennessee.

CONCLUSION

For all the reasons stated above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Dated, Marysville, California,
May 17, 1977.

JOHN L. GUTH,
Counsel for Petitioner.
OFFUTT, COOLIDGE, GISI & JONES,
A PROFESSIONAL CORPORATION,
Of Counsel.

(Appendices Follow)

APPENDICES

Appendix A

DO NOT PUBLISH

United States Court of Appeals
for the Ninth Circuit

No. 75-3255

Christopher Andrew Johnston, a minor, by Robert R. Bryson and Barbara Faye Bryson, his general guardians,
Plaintiff-Appellant,

vs.

United States of America,
Defendant-Appellee.

[February 24, 1977]

Appeal from the United States District Court
for the Eastern District of California

MEMORANDUM

Before: HUFSTEDLER and TRASK, Circuit Judges, and SWEIGERT,* District Judge.

Johnston, through his guardians, appeals from the decision of the district court granting appellee's mo-

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*Honorable William T. Sweigert, Senior United States District Judge, Northern District of California, sitting by designation.

tion for summary judgment and dismissing his action against the United States based on the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.* The suit alleged that appellant's father, a captain in the United States Air Force, sustained fatal injuries from an automobile crash on Beale Air Force Base caused by a civilian who was driving on the wrong side of the road and who had consumed intoxicating amounts of alcohol at the base cafeteria immediately prior to the accident.

Under the rule of *Feres v. United States,* 340 U.S. 135 (1950), the United States is not liable under the Federal Tort Claims Act to servicemen who sustain injuries arising out of or in the course of activity incident to service.

On several occasions this court has interpreted and applied this rule. In *Henninger v. United States,* 473 F.2d 814 (9th Cir. 1973), *cert. denied,* 414 U.S. 819 (1973), we held that the *Feres* rule bars an action by a serviceman who, while on active duty and not on furlough, was injured by others in the armed forces. Moreover, we have held that a serviceman injured on post while on military pass cannot recover under the Federal Tort Claims Act. *Coffey v. United States,* 455 F.2d 1380 (9th Cir. 1972), *aff'g* 324 F. Supp. 1087 (S.D. Ca. 1971). *See also Mills v. Tucker,* 499 F.2d 866 (9th Cir. 1974).

Captain Johnston's injury occurred within the confines of Beale Air Force Base while he was on leave (though, technically, still on active duty). Under our previous decisions, it is clear that suit could not be brought under the Federal Tort Claims Act. Accordingly, we rule the district court properly granted appellee's motion for summary judgment.

Johnston's suggestion that the application of the *Feres* doctrine has equal protection implications is unfounded. Classifying service personnel differently from non-service personnel in applying the Federal Tort Claims Act is not invidiously discriminatory and is in no sense arbitrary. The strict scrutiny doctrine is completely irrelevant.

AFFIRMED.

Appendix B

In the United States District Court
for the Eastern District of California

Civil No. S-2960 TJM

Christopher Andrew Johnston, a minor, by Robert R. Bryson and Barbara Faye Bryson, his general guardians,
Plaintiff,
vs.
United States of America, et al.,
Defendants.

[Filed July 30, 1975]

MEMORANDUM

The complaint on file herein alleges that on December 10, 1971, Captain Joseph R. Johnston, a captain in the United States Air Force, was driving a motor vehicle within the confines of Beale Air Force Base, when his vehicle was struck by another vehicle driven by Edward P. Sewar, whose vehicle was being driven on the wrong side of the road. Captain Johnston died as a result of injuries received and his son sues the United States for the wrongful death of his father pursuant to the Federal Tort Claims Act [hereafter FTCA], 28 USC §§ 1346(b), 2671

et seq. The complaint alleges that immediately prior to the collision, Edward P. Sewar was furnished alcoholic beverages at the Flightline Cafeteria on the Air Base and that intoxicating beverages were served to Sewar even though he was known to be intoxicated.

The case is here on a motion for summary judgment by the United States made pursuant to Federal Rules of Civil Procedure 56(b). The motion asserts that the United States is entitled to judgment as a matter of law since the Federal government is not liable under the FTCA for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.

In fact, there is no provision in the FTCA itself expressly excluding claims by or through servicemen. The United States Supreme Court, interpreting the scope of the FTCA, has held that in some cases servicemen *may* state claims against the United States pursuant to the FTCA, *Brooks v. United States,* 337 U.S. 49, 69 S.Ct. 918 (1949), but in other cases, such claims are denied. *Feres v. United States,* 340 U.S. 135, 71 S.Ct. 153 (1950).

In differentiating the two cases, recovery was permitted in *Brooks* where the two injured servicemen were on furlough and were on a public highway when their car was struck from behind by a United States Army truck driven by a civilian employee of the Army. In *Feres,* a consolidated case, recovery was denied to two of the military plaintiffs who charged military doctors with negligence as a result of treatment and operations in military hospitals, and re-

covery was also denied to the third military plaintiff who perished in a fire while asleep in the barracks at Pine Camp, New York.

Without repeating in detail the numerous reasons advanced by a unanimous Supreme Court in support of its decision in *Feres,* it will suffice to note the following language:

> "We conclude that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." 340 U.S. at 146.

The crucial question, therefore, is whether the injuries to Captain Johnston arose out of or were in the course of activity incident to his service in the United States Air Force.

In an affidavit filed with the motion for summary judgment, and not contested by plaintiff, it is noted that Captain Johnston was serving on active duty as a Captain in the United States Air Force at the time of the accident and was subject to all military regulations, orders, and disciplinary action under the Uniform Code of Military Justice. According to the affidavit, Captain Johnston was returning on the night of the accident to his assigned government quarters located on Beale Air Force Base, where he and his family resided. In memoranda filed with this court, plaintiff has asserted that Captain Johnston was returning from an off-base college course.

The Ninth Circuit Court of Appeals has held the "incident to service" test to be a much broader con-

cept than the "scope of employment" test, *Callaway v. Garber,* 289 F.2d 171 (9th Cir. 1961).

In its most recent pronouncement on the subject, the Ninth Circuit Court of Appeals has applied a rather strict reading of *Feres.* Thus, in *Henninger v. United States,* 473 F.2d 814 (9th Cir. 1973), the court noted as follows:

> "[I]t is the suit, not the recovery, that would be disruptive of discipline and the orderly conduct of military affairs. [citations omitted] This is a classic situation where the drawing of a clear line is more important than being able to justify, in every conceivable case, the exact point at which it is drawn. This is especially so because servicemen injured incident to their service are entitled to Veterans' benefits. *We hold that Feres absolutely bars Federal Tort Claims actions by servicemen injured 'while on active duty and not on furlough . . . due to the negligence of others in the armed forces.'"* 473 F.2d at 815-816. [emphasis added].

In addition, it should be noted that the court in *Henninger* indicated in footnotes 2 and 3 that its reading of *Feres* was a "strict" and "absolutist" one. See also *Coffey v. United States,* 324 F.Supp. 1087 (Cal. 1971), *affirmed* 455 F.2d 1380 (9th Cir. 1972), *cert. denied* 409 U.S. 858 (1972), where recovery was barred even though the serviceman was on pass.

Under the broad sweep of the "incident to service" test as enunciated in *Callaway* and under the strict reading of *Feres* required by *Henninger,* this court finds that Captain Johnston, on active duty and not

on leave or furlough, and injured as a result of alleged military negligence, was injured incident to service.[1]

Accordingly, this court concludes that plaintiff's claim is barred and that the motion of defendant[2] is GRANTED.

It Is So Ordered.

Dated: July 30, 1975.

Thomas J. MacBride
United States District Judge

[1]Furthermore, this court cannot ignore the fact alleged in an affidavit filed with the motion for summary judgment and uncontested by plaintiff, that Captain Johnston, who did not die until 1972, and as a result of his injuries, was medically retired from the Air Force in that year and received disability benefits and all other benefits which were payable by reason of his death, which was determined to have occurred in the line of duty. An important underlying rationale for the Supreme Court's decision in *Feres* was that other avenues of recovery are available to military and military dependent plaintiffs.

[2]There are "three" named defendants in this case—the United States of America, the Department of the Air Force, and the Army and Air Force Exchange Service—since all three are essentially the sovereign, they are treated herein as one defendant, the United States.

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In the United States District Court for the
Eastern District of California

Civil No. S-2960-TJM

Christopher Andrew Johnston, a minor, by Robert R. Bryson and Barbara Faye Bryson, his general guardians,
Plaintiff,
vs.
United States of America, et al.,
Defendants.

[Filed Aug. 26, 1975]

SUMMARY JUDGMENT

This matter came on regularly for hearing on the motion of the defendants for summary judgment. By stipulation the motion was submitted to the Court for decision upon the record, including written memoranda and affidavits filed in behalf of all parties. The Court having reviewed the record, being fully advised on the premises, and having entered its Memorandum

and Order on July 30, 1975 granting the defendants' Motion for Summary Judgment, which Memorandum and Order is incorporated by reference herein:

It Is Hereby Ordered that summary judgment be, and the same is, hereby entered in favor of the defendants and against the plaintiff in this action.

Dated: August 26, 1975.

Thomas J. MacBride
United States District Judge

Appendix C

UNITED STATES CONSTITUTION

Amendment V—Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV—Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix D

28 U.S.C. § 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof. June 25, 1948, c. 646, 62 Stat. 983.

28 U.S.C. § 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Repealed. Sept. 26, 1950, c. 1049, § 13(5), 64 Stat. 1043.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided,* That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative

or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

FILED
JUL 5 1977
MICHAEL RODAK, JR., CLERK

No. 76-1615

In the Supreme Court of the United States

OCTOBER TERM, 1977

CHRISTOPHER ANDREW JOHNSTON, a MINOR, by ROBERT R. BRYSON AND BARBARA FAYE BRYSON, HIS GENERAL GUARDIANS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1615

CHRISTOPHER ANDREW JOHNSTON, a MINOR, by ROBERT R. BRYSON AND BARBARA BRYSON, HIS GENERAL GUARDIANS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner challenges the applicability to this case of *Feres* v. *United States*, 340 U.S. 135, which precludes suits against the United States under the Federal Tort Claims Act for injuries to servicemen "where the injuries arise out of or are in the course of activity incident to service." 340 U.S. at 146.

This is a wrongful death action brought under the Federal Tort Claims Act on behalf of the son of Air Force Captain Joseph Johnston. On December 10, 1971, while on active duty and driving from a class off-base to his government-assigned quarters on base, Captain Johnston had a head-on collision on the base with a car driven by Edward Sewar. Immediately prior to the collision, Sewar had consumed

intoxicating amounts of alcoholic beverages at the Base Exchange cafeteria. The complaint alleged that employees of the cafeteria sold alcoholic beverages to Sewar even though he was known to be intoxicated and thereby proximately caused the accident (Pet. App. B iv-v).

Captain Johnston was severely injured by the accident. He was medically retired from the United States Air Force on February 22, 1972, and subsequently died as a result of his injuries. He received military disability benefits and all other benefits which were payable by reason of his death, which was determined to have occurred in the line of duty (Pet. App. B viii n. 1).

Petitioner's guardians brought suit on his behalf under the Federal Tort Claims Act. The district court found that Captain Johnston was injured incident to service and granted the government's motion for summary judgment on the basis of *Feres* v. *United States*, 340 U.S. 135, which held that the Tort Claims Act does not permit recovery for such injury (Pet. App. B iv-x). The court of appeals affirmed (Pet. App. A ii).

The judgment of the court of appeals is correct, and does not warrant review by this Court. In *Stencel Aero Engineering Corp.* v. *United States*, No. 76-321, decided June 9, 1977, this Court reiterated that the Federal Tort Claims Act does not provide a cause of action for injuries to servicemen incident to active-duty military service. Contrary to petitioner's contention (Pet. 6-7), the congressional decision to exclude tort liability of this nature rests not only on a concern for the impact of such tort litigation on military discipline, but equally upon the "distinctively federal * * * character" of the relationship between the government and members of the armed forces, and the existence of "a statutory 'no fault' compensation scheme which provides generous pensions to injured servicemen,

without regard to any negligence attributable to the Government" (*Stencel Aero Engineering Corp., supra*, slip op. 5).[1]

Feres does not require, as petitioner urges, a finding that petitioner's suit would interfere with military discipline by pitting the serviceman against persons in his chain of command. The courts of appeals have repeatedly rejected this contention. *E.g., Hass for Use and Benefit of United States* v. *United States*, 518 F. 2d 1138, 1140-1141 (C.A. 4); *Henninger* v. *United States*, 473 F. 2d 814, 815-816 (C.A. 9), certiorari denied, 414 U.S. 819; *Hall* v. *United States*, 451 F. 2d 353, 354 (C.A. 1); see also *Shults* v. *United States*, 421 F. 2d 170, 172 (C.A. 5); *Harten* v. *Coons*, 502 F. 2d 1363, 1365 (C.A. 10), certiorari denied, 420 U.S. 963.[2]

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[1]Petitioner argues that application of the *Feres* rule to him violates the equal protection principles of the Fifth Amendment (Pet. 7-9). As the court of appeals noted (Pet. App. A iii), the classification in this case is one of service. The factors enumerated in *Feres, supra*, and *Stencel Aero Engineering Corp.* v. *United States, supra*, provide a rational basis supporting this classification. See *Dandridge* v. *Williams*, 397 U.S. 471, 485-486; *Weinberger* v. *Salfi*, 422 U.S. 749, 769-770.

[2]Petitioner contends that a conflict among the circuits exists because of the Sixth Circuit's decision in *Hale* v. *United States*, 416 F. 2d 355, 359-360, that a serviceman who was off the military reservation at the time of the injury had a cause of action under the Tort Claims Act. The issue whether *Feres* applies when the serviceman is off base is not presented by this case and the courts have been consistent in finding that *Feres* applies to cases where the serviceman, like petitioner, was not on leave and was on the military post when the injury incident to service occurred. Compare, *e.g., Coffey* v. *United States*, 455 F. 2d 1380 (C.A. 9), affirming 324 F. Supp. 1087, 1088 (S.D. Calif.), with *Mills* v. *Tucker*, 499 F. 2d 866, 868 (C.A. 9).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

JULY 1977.

Supreme Court, U. S.
FILED
JUL 27 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-1615

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vs.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPRINTED REPLACING REPLY BRIEF FOR PETITIONER

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In the Memorandum for the United States in Opposition, reference is made to *Stencel Aero Engineering Corp. v. United States,* No. 76-321, decided June 9, 1977, and it is suggested that that case is determinative of the issues raised in this Petition. What the

Government's Memorandum does not make clear is that this honorable Court, in the *Stencel* decision, clearly states that *Feres v. United States* denies the right to sue under the Federal Tort Claims Act only to "on duty" servicemen. This reference is found in the first sentence of Section 2 of that decision beginning on page three and, again, in the first sentence of the only complete paragraph on page seven of that Slip Opinion.

There is no dispute that the father of Christopher Andrew Johnson was not "on duty" at the time he was killed due to the negligence of non-military personnel working in the flightline cafeteria. The distinction between "on duty" and "off duty" is even more clearly made in the Dissenting Opinion.

> "I cannot agree that the narrow, judicially created exception to the waiver of sovereign immunity contained in the Act should be extended to any category of litigation other than suits against the Government by active duty servicemen based on injuries incurred *while on duty.*" (Emphasis added.)

It is this distinction that the Ninth Circuit Court of Appeals has failed to make in the instant case. The failure to make this distinction caused the conflict with the Sixth Circuit Court of Appeals. *Hale v. United States,* 416 Fed. 2d 355 (1969). The failure to make the distinction also results in the unjustified extension of the *Feres* case to a point where it is contrary to the position of this Court and to the point where it violates the Petitioner's constitutionally guaranteed right to equal protection of law.

It is again respectfully requested that this Court resolve this conflict between the Circuits and settle the issue that is clearly presented by this case.

Dated, Marysville, California,
July 25, 1977.

Respectfully submitted,
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